

## DEBBIE COLLIER

PROFESSOR OF LAW, CENTRE FOR TRANSFORMATIVE REGULATION OF WORK,  
UNIVERSITY OF THE WESTERN CAPE

### AMENDMENTS TO THE EMPLOYMENT EQUITY ACT IN SOUTH AFRICA: MISSING THE TARGET\*

In May 2022, parliament in South Africa « gave the green light » to the Employment Equity Amendment Bill B14B - 20201. The Bill, which amends the provisions of the Employment Equity Act 55 of 1998 (the EEA), currently awaits presidential assent, and it is anticipated that the amendments will come into force on 1 September 2023<sup>2</sup>.

The EEA forms part of the non-discrimination law framework in South Africa<sup>3</sup>, underpinned by a Constitutional commitment to substantive equality<sup>4</sup>. The EEA includes provisions for the implementation of affirmative action measures in the workplace<sup>5</sup>, and specifically, Chapter III of the EEA is designed to achieve *equality of outcome*<sup>6</sup> through the implementation of affirmative action to « redress the disadvantages in employment experienced by designated groups (...) to ensure their equitable representation in all occupational levels in the workplace »<sup>7</sup>.

\* For a more detailed version of this assessment of the Draft Amendment, see D. Collier, « The Employment Equity Amendment Bill B14B - 2020: Innovating towards Equity or Kicking the Can down the Road? », *ILJ*, no. 44, 2023, p. 1.

1 *SabinetLaw*, « Employment Equity Amendment Bill Under the Spotlight », January 12, 2023.

2 *Ibid.*

3 Other relevant legislation includes the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and the Broad-based Black Economic Empowerment Act 53 of 2003.

4 Section 9(2) of Constitution of the Republic of South Africa, 1996 provides that « [e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken ».

5 For context on the need for affirmative action, and for an overview of the statutory framework in South Africa, see D. Collier, « Discrimination et égalité au travail en Afrique du Sud » and an English translation (« From apartheid to affirmative action: an overview of equality law in the South African Workplace »), *Revue de droit comparé du travail et de la sécurité sociale*, no. 2015/2 and no. 2015/3.

6 « Equality » is defined in section 1 of the PEPUDA to include « equality in terms of outcomes ».

7 Section 2(b) of the EEA.

## I - THE GOAL: EQUITABLE RACE AND GENDER REPRESENTATION

To achieve *equitable representation* « designated employers »<sup>8</sup> are required to comply with the affirmative action provisions of the EEA, and must implement affirmative action measures until such time as the employer's workforce is equitably representative at each occupational level « in relation to the demographic profile of the national and regional economically active population [EAP] »<sup>9</sup>.

The national and provincial EAP are expressed in terms of race and gender in terms of the following race/population groups: Africa; Coloured, Indian and White.

In this regard, the demographic profile of the national EAP is as follows:

National EAP by population group and gender			
Race	Male	Female	Total
African	43.6%	35.8%	79.4%
Coloured	5%	4.1%	9.1%
Indian	1.8%	0.9%	2.7%
White	4.9%	3.9%	8.8%
<b>Total</b>	<b>55.3%</b>	<b>44.7%</b>	<b>100%</b>

Source: 22<sup>nd</sup> Commission for Employment Equity Annual Report (2021-2022), p. 18.

The Commission for Employment Equity (CEE)<sup>10</sup> has expressed concern with the slow pace of transformation in terms of race and gender demographics in the workplace and indicates that the Amendment Bill has been informed by recommendations « to speed up the pace of transformation »<sup>11</sup>. The Memorandum on the Objects of the Amendment Bill identifies the purpose of the Bill as being four-fold<sup>12</sup>. The first of the objects is to empower the Minister of Labour « to determine sectoral numerical targets for the purpose of

8 The EEA currently identifies the following « designated employers », who are required to implement affirmative action: (a) a person who employs 50 or more employees; (b) a person who employs fewer than 50 employees but has a total annual turn-over that is equal to or above the applicable annual turn-over of a small business in terms of Schedule 4 of this Act; (c) a municipality ... ; (d) an organ of state ...; and (e) an employer bound by collective agreement ... to the extent provided for in the agreement. ... In terms of the Amendment Bill, paragraph (b) is deleted from the definition of « designated employer ».

9 Section 42(a) of the EEA.

10 The CEE is established by Part IV of the EEA and its functions include advising the Minister on policy and « on any matter relating to the application of [the EEA] (...) including (...) benchmarks for the setting of numerical goals in various sectors ». Section 30(2) of the EEA.

11 Commission for Employment Equity (CEE) 21<sup>st</sup> Annual Report (2020-2021), p. 6. For a review of an earlier version of the amendments published in 2018, see S. Gaibie and P. Naidoo « The Employment Equity Amendment Bill 2018: Grappling with an Evaluation of «Equity» 20 Years Later », *ILJ*, no. 41, 2020, p. 88; D. Collier « The Employment Equity Amendment Bill B14B - 2020: Innovating towards Equity or Kicking the Can down the Road? », *op. cit.*

12 Employment Equity Amendment Bill B14B, 2020, p. 6 (§ 1).

ensuring the equitable representation of suitably qualified people from designated groups (blacks women and persons with disabilities)<sup>13</sup> at all occupational levels in the workforce »<sup>14</sup>. Secondly, the Amendment Bill seeks to operationalise a provision of the EEA<sup>15</sup> that requires proof of compliance with the provisions of the EEA by way of a certificate issued by the Minister of Law as a condition for third parties seeking to do business with the state. Thirdly, the Amendment Bill removes a requirement for the Health Professions Council of South Africa to certify psychological testing and similar assessments of employees<sup>16</sup>; and fourthly the Bill (« to reduce regulatory burden on small employers ») removes a provision in the EEA<sup>17</sup> that permitted reporting on voluntary compliance by smaller employers with the affirmative action provisions of the EEA.

Response to the Bill has been mixed, and in many respects the reaction has been critical<sup>18</sup>. In particular, the focus of the EEA and the Bill on achieving proportionate representation based on gender and race demographics has raised concerns that socio-economic factors have been overlooked, with scholars generally calling for « a more nuanced, contextualised approach instead of one that is mandatory, rigid and numerical »<sup>19</sup>. This echoes Fredman's argument that « status [race and gender] should not be regarded as simply a proxy for socio-economic disadvantage » and that achieving substantive equality requires more than « simply changing the racial or gender composition of existing structures »<sup>20</sup>.

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- 13 « Black people » is defined as « a generic term which means Africans, Coloureds and Indians ». Section 1 of the EEA.
- 14 Currently employers, in consultation with trade unions and employees, determine the employer's targets. The sector targets were published for comment in May 2023 (*Government Gazette* No. 4858: <https://www.labour.gov.za/DocumentCenter/Regulations%20and%20Notices/Regulations/Employment%20Equity/Employment%20Equity%20Sector%20Targets%20Regulations%20Combined.pdf>). Concerns were raised regarding the targets, and the targets are being revised.
- 15 Section 53 of the EEA.
- 16 Section 8 of the EEA, as the Council « does not have the capacity or procedures to undertake this certification ». Employment Equity Amendment Bill B14B, 2020, p. 6 (§ 2.2).
- 17 Section 14 of the EEA.
- 18 An opposition party Member of Parliament has referred to the Bill as a « pernicious piece of social engineering » which will exacerbate the « flight of skills and capital » from South Africa. M. Cardo, « EE Amendment Bill: A job-destroying jackhammer », *PoliticsWeb*, 9 September 2021. However, it should be expected that affirmative action may have an « indirect and gradual levelling down » impact on dominant groups in so far as it is necessary « to secure freedom for all ». T. Khaitan, *A Theory of Discrimination Law*, Oxford University Press, 2015, p. 133.
- 19 S. Gaibie and P. Naidoo, « The Employment Equity Amendment Bill 2018: Grappling with an Evaluation of «Equity» 20 Years Later », *op. cit.*, p. 97. See also A. M. Louw, « The Employment Equity Act, 1998 (and other myths about the pursuit of "Equality", "Equity" and "Dignity" in post-apartheid South Africa) », *PER/PELJ*, vol. 18, no. 3, p. 594.
- 20 S. Fredman, « Reimagining power relations: Hierarchies of disadvantage and affirmative action », *Acta Juridica*, 2017, p. 124.

The Amendment Bill reflects a policy shift towards a quota system for affirmative action measures, with quotas to be determined at a sectoral level by the Minister of Labour<sup>21</sup>. Whereas section 15 of the EEA currently provides a relatively flexible framework for individual employers to determine appropriate affirmative action measures and targets and expressly does not require quotas, s 15A, introduced in the Bill, empowers the Labour Minister, through a process of consultation, to determine and set sectoral numerical targets within a sector.

## II - MISSING THE TARGET: A MATTER OF INTERNATIONAL LAW CONCERN

While scholars in South Africa generally support the implementation of affirmative action measures<sup>22</sup>, there is a concern that the approach is increasingly rigid and that the amendments fail to prioritise the least advantaged persons within the groups entitled to protection. Pertinently, it would seem that the amendments fail to address the South African Human Rights Commission (HRC) concerns that the EEA's « definition of "designated groups" and South Africa's system of data disaggregation is not in compliance with constitutional or international law obligations (...) [and that] (...) Government's failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data, especially the extent to which such measures advance indigenous peoples and people with disabilities, likewise violates international law obligations »<sup>23</sup>.

The HRC concerns regarding alignment with international human rights relate to the position of persons with disabilities; indigenous communities (the Khoi and San people); and foreign nationals. In the context of persons with disabilities, the HRC highlights the limited employment opportunities and the intersectional experience of discrimination for persons with disabilities<sup>24</sup>.

Although South Africa has ratified the UN Convention on the Rights of Persons with Disabilities, 2007 (CRPD), the provisions of the CRPD have yet to be fully domesticated in South African law, and the Amendment Bill is a missed opportunity to do so, and in

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- 21 In this regard, the EEA 17 form in the Draft Regulations, 2018 identifies the following 18 sectors: (1) Agriculture, Forestry & Fishing; (2) Mining and Quarrying; (3) Manufacturing; (4) Construction; (5) Financial and Insurance Activities; (6) Transportation and Storage; (7) Information and Communication; (8) Water Supply, Sewerage, Waste Management and Remediation Activities; (9) Electricity, Gas, Steam and Air Conditioning Supply; (10) Human Health and Social Work Activities; (11) Arts, Entertainment and Recreation; (12) Real Estate Activities; (13) Professional, Scientific and Technical Activities; (14) Wholesale and Retail Trade; Repair of Motor Vehicles and Motorcycles; (15) Accommodation and Food Service Activities; (16) Public Administration and Defence; Compulsory Social Security; (17) Education; and (18) Administrative and Support Activities.
- 22 For a contrary view, see M. Brassey : « The Employment Equity Act: Bad for employment and bad for equity », *ILJ*, no. 19, 1998, p. 1359 ; « The More Things Change ... Multiracialism in Contemporary South Africa », *Constitutional Court Review*, no. 9, 2019, p. 443.
- 23 SAHRC, « Achieving Substantive Economic Equality through Rights-based Radical Socio-economic Transformation in South Africa 2017-2018 », p. 5 (HRC Report 2018). See also the HRC observations in SAHRC « Report of the South African Human Rights Commission: National Hearing on Unfair Discrimination in the Workplace », 8 March 2016 (HRC Report 2016).
- 24 HRC Report 2016, p. 50.

particular to legislate the CRPD principle that « discrimination on the basis of disability » « includes all forms of discrimination, including denial of reasonable accommodation »<sup>25</sup>.

In the context of indigenous communities in South Africa, the HRC has expressed concern with the « virtual political and social invisibility » of the Khoi and San persons as indigenous people in South Africa, and has called on Government « to take urgent steps to address the current situation in relation to the Khoi and San persons in South Africa »<sup>26</sup>. The current legislative framework for affirmative action in essence adopts an apartheid South Africa approach in which Khoi and San persons are « forcibly classified as “Coloured” »<sup>27</sup>, and the HRC calls for urgent steps to address this<sup>28</sup>.

Finally, in the context of foreign nationals, the EEA limits the beneficiaries of affirmative action to South African citizens, with the obligation on employers being to ensure that their workforce mirrors the race and gender demographics of the economically active *South African* population at each occupational level<sup>29</sup>. The CEE specifically « urges employers to give preference to South African Nationals in order to deal with the substantial high levels of unemployment in our country »<sup>30</sup> and expresses support for related policy and proposed legislation that will impose a « a maximum quota for the employment of foreign nationals »<sup>31</sup>. However, there are concerns with this approach and whether the restrictions on the employment of foreign nations comply with South African’s international law obligations, and the extent to which these instruments unfairly discriminate against foreign nationals<sup>32</sup>.

### Conclusion

The HRC has emphasised deficiencies with the EEA race classifications that are at the heart of the design of affirmative action measures in South Africa<sup>33</sup>, and has raised concerns

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25 Art. 2 of the CRPD.

26 HRC Report 2016, p.34.

27 *Ibid.* Although the Traditional and Khoi-San Leadership Act 3 of 2019 was recently enacted, it is not clear that the provisions of the Act will address this concern.

28 Already in 2005, the UN Special Rapporteur on the human rights and fundamental freedoms of indigenous people recommended that « the indigenous communities be recognised as such constitutionally and that the legal institutions maintain the stigma of their classification as “Coloureds” by the apartheid regime be removed ». Cited in the Konrad-Adenauer-Stiftung e.V South Africa Country Report « The Khoisan in contemporary South Africa: Challenges of recognition as an indigenous people », 2013, p. 2 : [https://www.kas.de/documents/252038/253252/7\\_dokument\\_dok.pdf\\_35255\\_2.pdf/13558f4e-c812-7525-51f1-bed7b106f223?version=1.0&t=1539655331503](https://www.kas.de/documents/252038/253252/7_dokument_dok.pdf_35255_2.pdf/13558f4e-c812-7525-51f1-bed7b106f223?version=1.0&t=1539655331503)

29 The EAP statistics reflect white, coloured, African and Indian South Africans, without reflecting persons with disabilities, nor other minority indigenous communities (or any other religious, cultural and other ethnic minority communities).

30 CEE 22nd Annual Report (2021-2022).

31 Clause 12B of the Employment Services Amendment Bill, 2021.

32 Stellenbosch University, « Submission on the Social Justice Implications of Draft National Labour Migration Policy and Employment Services Amendment Bill », 28 May 2022.

33 HRC Report 2018, noting, p. 34, that « indigenous people, those whose ethnic descent may be from mixed race marriages, and linguistics or tribal minorities within the designated groups are therefore not accommodated by the EEA ».

that the implementation of the EEA may be « leading to new imbalances »<sup>34</sup>. The HRC points out that the insufficient disaggregation of data results in « measures [that] are not capable of being targeted at the most vulnerable groups in society (...) [and cannot] (...) respond to new forms of discrimination, or to compounded discrimination »<sup>35</sup>; adding that « measures should be designed and implemented on the basis of need », which requires a consideration of socio-economic conditions<sup>36</sup>.

The Amendment Bill introduces substantial changes to the regulatory framework for affirmative action, yet the design and stated purpose of the Bill have not addressed concerns regarding the alignment of the EEA with prevailing international law principles on the implementation and termination of special measures<sup>37</sup>. This is a matter of public interest and as such the forthcoming sectoral numerical targets and revised employment equity regulations require careful scrutiny from the legislature and stakeholders alike to ensure that the amendments are in fact on target.

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34 HRC Report 2018, p. 33. The HRC references the CERD General Recommendation 32: « The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination » CERD/C/GC/32 (2009) § 22, and points out, at p. 34, that « the CERD has on two occasions requested government to provide more exhaustive statistical demographic data that includes social and economic indicators, and furthermore accounts for indigenous groups and non-citizens ».

35 HRC Report 2018, p. 35.

36 HRC Equality Report 2018, p. 30. In this regard, the CERD General Recommendation 32 (§ 17) provides that « [a]ppraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country ».

37 CERD General Recommendation 32 (§ 16) states that « [s]pecial measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned ».